No. 78-947

In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF NEW YORK, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported. The opinion of the district court granting the Board's motion for a preliminary injunction (App., *infra*) is reported at 436 F. Supp. 335. The opinion of the district court denying the state's motion to dismiss the proceeding as moot and

reaffirming the grant of injunctive relief (Pet. App. 3a-7a) is not yet reported.

JURISDICTION

The order of the court of appeals was entered on November 13, 1978 (Pet. App. 1a). The petition for a writ of certiorari was filed on December 13, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a state may regulate the right of health care employees covered by the National Labor Relations Act to engage in a peaceful strike.

2. Whether the proceeding should have been dismissed as moot.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 5-10.

Other relevant provisions of the Act are:

> SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in an unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.
>
> * * * * *
>
> SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

1. Local 1115, Joint Board, Nursing Home and Hospital Employees Division (the "Union") and twenty proprietary nursing homes in Nassau and Suffolk Counties entered into collective bargaining agreements effective January 1, 1975. The employers agreed, *inter alia*, to increase wages and benefits on January 1, 1976 (A. 69-95).[1] On December 15, 1975, the employers notified the Union that, because the State of New York had refused to increase its Medicaid reimbursement rate over the 1975 level, they would be unable to pay the increases due January 1,

[1] "A." refers to the appendix to the parties' briefs in the court of appeals.

1976, including payments to the Union's Welfare Trust Fund and Legal Service Fund. Within the next three weeks the Union filed unfair labor practice charges with the Board and announced its intention to strike beginning January 21, 1976 (A. 7-8).

In response to the threat of a strike, the State Commissioner of Health issued orders on January 19 and 21, 1976, prohibiting the Union and its members from engaging in strikes, picketing, or any other form of interference with the operations of the nursing homes (A. 96-101).[2] On January 21, the State Attorney General, acting in accordance with New York Public Health Law § 12(5) (McKinney 1977 Supp.),[3] filed an injunction action against the Union in New York State Supreme Court, Suffolk County. See *New York* v. *Local 1115, Joint Board Nursing Home and Hospital Employees Division, et al.*, No. 76-995. On the same day the state court granted the state's request for a temporary order restraining strike activity. Two weeks later, the court granted a preliminary injunction against any strike action (A. 102-107).

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[2] In issuing the orders, the Commissioner relied on Article XVII, Section 3 of the New York Constitution and on Section 206(1)(a) and Article 28 of the New York Public Health Law.

[3] New York Public Health Law § 12(5) provides:

> It shall be the duty of the attorney general upon the request of the commissioner to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto * * *.

On February 20, 1976, the Union removed the State Attorney General's suit to the United States District Court for the Eastern District of New York. The Union argued that the State's suit sought to enjoin activities that are regulated exclusively by the National Labor Relations Act. On the State's motion, the district court remanded the action to state court on the ground that the complaint stated a claim solely under state law. *New York* v. *Local 1115, Joint Board, Nursing Home and Hospital Employees Division*, 412 F. Supp. 720, 724 (E.D. N.Y. 1976). The Union then appealed the preliminary injunction to the State Supreme Court's Appellate Division. On March 14, 1977, the court, by a divided vote, rejected the Union's preemption argument and affirmed the preliminary injunction. 56 App. Div. 2d 310, 392 N.Y.S. 2d 884 (1977). The Union appealed to the New York Court of Appeals.

Meanwhile, on May 3, 1976, the Board's Regional Director issued a complaint in response to the unfair labor practice charges filed by the Union. Following a hearing, the Board, on January 28, 1977, found the employers guilty of unfair labor practices. 227 N.L.R.B. 1680. The Board's cease and desist order was enforced by entry of a consent judgment on September 12, 1977. No. 77-7005 (2d Cir.).

2. On September 8, 1976, while the Union's state appeal was pending in the Appellate Division, the Board instituted the present action in the United States District Court for the Eastern District of New York. The Board sought to enjoin the State

from restraining the strike activity of the Union and the employees; the Board also sought a declaratory judgment that labor relations in the nursing home field are within the exclusive jurisdiction of the Board and that state authority is thus preempted by the NLRA (A. 4-13).[4] The Board moved for a preliminary injunction to prevent the State and its officials from prosecuting the state court action against the Union, enforcing the preliminary injunction obtained in that action, or attempting in any way to regulate conduct within the Board's exclusive jurisdiction (A. 14-16).

On August 22, 1977, the district court, relying on *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), granted the Board's motion for a preliminary injunction (App., *infra*). The court ruled (*id.* at 7a-8a) that the preliminary injunction obtained by the State directly interfered with the nursing home employees' right to strike, a right protected by Section 7 of the NLRA, 29 U.S.C. 157, since the enactment of the 1974 health care amendments to that statute, 88 Stat. 395.

After the district court's decision, the Union sought leave from the New York Court of Appeals to withdraw its appeal. The State agreed to the withdrawal, and the Court of Appeals dismissed the appeal on October 19, 1977.[5] The State then moved to discontinue as moot its action against the Union in the State Supreme Court. On November 16, 1977, the court granted the motion and dismissed the action with prejudice (Pet. App. 4a-5a).

After its state court suit had been concluded in this manner, New York moved in the district court to dismiss the Board's action as moot because the underlying dispute between the Union and the nursing homes had been settled and the State had discontinued its action to enjoin the strike by the Union. The Board urged the court to deny the motion to dismiss and to continue in effect the terms of the outstanding preliminary injunction. The Board argued that this relief was appropriate because of the likelihood that the State's improper conduct would be repeated in future occasions involving potential strikes by nursing home employees (Pet. App. 5a).

On March 23, 1978, the district court denied the State's motion to dismiss and reaffirmed its earlier decision granting the Board's motion for injunctive relief (Pet. App. 3a-8a). The court found that there was a significant likelihood that the Union would again seek to strike the employers for failure to make

[4] Following issuance of the preliminary injunction in the state court, the employers made the required payments into the Welfare Trust and Legal Service Funds, thereby removing the immediate threat of a strike. At the time the Board instituted this action, however, the state court preliminary injunction was still in effect and the State's complaint seeking a permanent injunction was still pending. Thus, the State's suit continued to affect the employee's right to strike.

[5] The Board was not a party to the state court proceedings. It entered an appearance in the federal district court at the oral argument on the State's motion to remand the state injunctive proceeding to the state court (App., *infra*, 5a n.4).

payments required under the collective bargaining agreement (*id.* at 5a). The court added (*id.* at 5a-6a):

> The State has refused to stipulate that it would comply with this court's decision of August 24, 1977, and at the most recent conference before this court the Assistant Attorney General stated that "the question as to what the State will do the next time depends on the circumstances and all the facts surrounding the situation that develops in the State 'the next time.'" Tr. of December 9, 1977 Conference at 9.
>
> Under these circumstances, the court finds that the case is not moot and that injunctive relief is appropriate. The Board has made the required showing that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

The court of appeals affirmed (Pet. App. 1a-2a).

ARGUMENT

In *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138 (1971), this Court held that the Board may file suit in federal district court to restrain the enforcement of a state court injunction on the ground that it regulates conduct governed exclusively by the NLRA.[6] The district court and court of appeals in the present

[6] In *Nash-Finch*, a state court had enjoined peaceful union picketing at a time when the underlying labor dispute was the subject of a Board proceeding.

case ruled that "State regulation of the right of nursing home employees to strike is preempted by the 1974 amendments to the NLRA" (App., *infra*, 9a). Petitioners disagree, and argue in addition that, even if the district court decided the preemption question correctly, the Board should have pursued the matter in the state court proceeding. In any event, the State maintains, the Board's suit in federal court should have been dismissed as moot. These contentions are without merit. The district court correctly applied established legal principles to an unexceptional factual situation, and petitioners have not identified any relevant conflict among the decisions of the federal courts. Review by this Court is not warranted.

1. In 1974, the National Labor Relations Act was amended to extend its coverage to employees of "health care institutions."[7] At the same time, "Congress enacted special provisions for strike notice and mediation, applicable solely to the health care industry, intended to avoid disruptions to patient care caused by strikes." *Beth Israel Hospital* v. *NLRB*, No. 77-152 (June 22, 1978), slip op. 12. Apart from these provisions, the amended Act accords to health care employees the same right to strike enjoyed by other employees covered by the Act.

[7] Section 2(14) of the Act defines a "health care institution" as "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged persons." 29 U.S.C. 152(14).

In amending the NLRA to cover employees of health care institutions, Congress indicated its intent that federal regulation of labor relations in the health care field should displace state regulation of the same subject matter. See, *e.g.*, 120 Cong. Rec. 22575 (1974) (remarks of Sen. Williams); *id.* at 22942 (remarks of Rep. Thompson). As the court of appeals observed in another recent case, "the unequivocal intent of Congress was to include all the labor relations of voluntary hospitals within the NLRA. Both the Senate and the House rejected amendments meant to ensure continued state jurisdiction in hospital matters. This is in keeping with the ordinary role of federal preemption in labor matters." *NLRB* v. *Committee of Interns and Residents*, 566 F. 2d 810, 815 (2d Cir. 1977) (citations and footnote omitted), cert. denied, No. 77-872 (Feb. 27, 1978).

Relying on *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978), however, petitioners contend (Pet. 34-39) that Congress has not divested the State of the right to exercise its police power to regulate strikes of health care employees when the State Commissioner of Health decides that a strike would create a "health emergency." *Sears* stands for no such proposition.

The question in *Sears* was whether a state may enjoin trespassory picketing "which is arguably—but not definitely—prohibited or protected by federal law." 436 U.S. at 182. The Court held that under the peculiar circumstances there presented the

preemption principles governing application of the NLRA (see *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959)) do not preclude state courts from exercising their equitable jurisdiction to grant injunctive relief. The Court stressed first that the state interest in the case was limited to the location of the picketing (436 U.S. at 185). The Court also emphasized that there was no acceptable method by which the employer could obtain a ruling from the Board concerning the picketing's protected status *vel non* under Section 7 of the NLRA (*id.* at 202). Here by contrast the employees' strike activity is clearly protected by the NLRA, because it was intended to protest the employers' unfair labor practice (see pages 4, 5 *supra*). No trespass issue is involved. To permit the State to negate the protection provided by federal law would undercut the preemption principles set forth in *Garmon*.

Petitioners attempt to derive support from the Court's statement in *Sears* that the preemption doctrine does not "sweep[] away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected" (436 U.S. at 188). In passing the 1974 health care amendments, however, Congress evidenced both its "careful consideration" of competing state interests and its decision to bring regulation of the labor relations of health care employees under the NLRA. This legislative choice does not leave the states without recourse if a strike or picketing by nursing home employees endangers the health of nurs-

ing home residents. It means only that states may no longer regulate strikes and picketing by the newly-covered group of employees. As the district court noted (App., *infra*, p. 10a):

> While the State may not prohibit the employees from going out on strike or engaging in peaceful picketing, when it appears that the lives and health of nursing home residents are threatened, the State remains free, in the exercise of its local responsibility to take whatever reasonable steps are necessary to protect the residents from the effects of strike activity.

2. Petitioners contend (Pet. 33-34) that, even if state action were preempted, the preemption question should have been litigated in the state court proceeding. This argument conflicts with the holding in *NLRB* v. *Nash-Finch*, *supra*. The court there ruled (404 U.S. at 147) that, where "[t]he exclusiveness of the federal domain is clear * * * and where it is a public authority that seeks protection of that domain, the way seems clear. For the Federal Government and its agencies, the federal courts are the forum of choice." [8]

[8] There is no inconsistency between the district court's response to the Union's removal of the state proceeding in April 1976 and the court's subsequent grant of the injunctive relief sought by the Board in August 1977. When the Union removed the state court proceeding to federal court and the State moved to remand, the district court properly granted the motion, because the State's suit asserted a claim under state law and the Union's federal preemption argument was raised only as a defense (see page 5, *supra*). Because the State's suit arose under state law, the federal district court would have lacked original jurisdiction over the suit if it had been filed initially in federal court; therefore, removal would not have been proper under 28 U.S.C. 1441(a). By contrast, when the Board filed its complaint in the present action seeking injunctive relief against the State, the claim was based on the preemptive effect of the NLRA and the district court accordingly had subject matter jurisdiction under 28 U.S.C. 1331 and 1337. As this Court explained in *Nash-Finch*, the federal courts are "the forum of choice" for the federal government and its agencies because such an arrangement is "'preferable in the context of healthy federal-state relations.'" 404 U.S. at 147, quoting *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226 (1957). See also 28 U.S.C. 1345.

3. Finally, the district court properly refused to dismiss the case on grounds of mootness. An action for injunctive and declaratory relief does not become moot simply because the allegedly illegal conduct of the defendant has ceased. The defendant can establish mootness only if he "can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 633 (1953) (footnote omitted); accord, *Steffel* v. *Thompson*, 415 U.S. 452, 459-460 (1974); *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304-305 (1964). A live controversy will persist as long as the defendant is free to return to his old ways and the circumstances suggest that it is likely he will have the opportunity to do so. *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 43 (1944).

Here the district court found that the controversy which precipitated the strike threat was likely to recur and the State refused to agree not to institute similar state actions against the Union in the future.

The potential for state interference with the national policy embodied in the NLRA thus continued even after the State agreed to a dismissal of its suit in state court. In such a situation, this Court has taught, the federal courts " 'should be astute to avoid hindrances' " to the expeditious resolution of pre-emption disputes. *Liner* v. *Jafco, Inc., supra*, 375 U.S. at 306, quoting *Love* v. *Griffith*, 266 U.S. 32, 34 (1924).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979

APPENDIX

UNITED STATES DISTRICT COURT
E. D. NEW YORK

No. 76 C 1656

NATIONAL LABOR RELATIONS BOARD, PLAINTIFF

v.

STATE OF NEW YORK, LOUIS J. LEFKOWITZ as Attorney General of the State of New York, and ROBERT P. WHALEN, M.D., as Commissioner of Health of the State of New York, DEFENDANTS

Aug. 22, 1977

NEAHER, District Judge.

The issue in this case is whether the National Labor Relations Act ("NLRA"), as amended in 1974, preempts State authority to act in regard to labor relations in the hospital and nursing home field and thus requires this court to enjoin the further enforcement of State orders which have prohibited and restrained organized employees of nursing homes in Nassau and Suffolk Counties from exercising their right to strike.

I.

The facts which have given rise to this controversy between the National Labor Relations Board ("NLRB") and the State of New York are not in dispute. In collective bargaining agreements effec-

tive January 1, 1975 between Local 1115, Joint Board, Nursing Home and Hospital Employees Division ("Local 1115" or "union") and twenty proprietary nursing homes in Nassau and Suffolk Counties, the employers agreed, *inter alia*, to increase wages and benefits on January 1, 1976. On December 15, 1975 the employers notified Local 1115 that, because the State of New York had refused to increase its Medicaid reimbursement rate over the 1975 level, they would be unable to pay the increases due January 1, 1976. Within the next three weeks Local 1115 filed unfair labor practice charges with the NLRB and announced its intent to strike beginning January 21, 1976.

In response to the threat of a strike the State Commissioner of Health issued orders on January 19 and 21, 1976 prohibiting Local 1115 and its members from engaging in strikes, picketing or any other form of interference with the operations of the nursing homes.[1] The Commissioner also requested that the State Attorney General apply for injunctive relief.

On January 21 the Attorney General, pursuant to Public Health Law § 12(5), filed a complaint against

[1] In issuing the orders the Commissioner relied on Article XVII, Sec. 3 of the State Constitution ("The protection and promotion of the health of the inhabitants of the state are matters of public concern and provision therefor shall be made by the state"), Article 28 of the Public Health Law (dealing with hospitals), and § 206 of the Public Health Law ("1. The commissioner shall: (a) take cognizance of the interests of health and life of the people of the state . . .").

Local 1115 in the Supreme Court, Suffolk County.[2] On the same day the State court granted the State's request for a temporary order restraining strike activity pending a hearing on a preliminary injunction. On February 5, 1976 the State court granted a preliminary injunction against any strike action, as it found that "[n]ot to grant this relief would cause tremendous suffering to the thousands of residents of the nursing homes and would disrupt the entire system." The court denied a preliminary injunction against picketing.

On February 20, 1976 Local 1115 removed the action to this court. It argued that the State was seeking to enjoin activities which are exclusively regulated by the NLRA. Upon the State's motion, this court remanded the action on April 23, 1976 on the ground that the complaint stated a claim solely under State law. The court concluded:

> "Whether the Union's preemption contention is correct should be decided as a matter of defense in the State courts in the first instance, with ultimate recourse to the Supreme Court. State courts are obliged under the Supremacy Clause to follow federal law where applicable and there is no reason to believe that they are

[2] Public Health Law § 12(5) provides:

> "It shall be the duty of the attorney general upon the request of the commissioner to bring an action for an injunction against any person who violates, disobeys or disregards any term or provision of this chapter or of any lawful notice, order or regulation pursuant thereto . . ."

unwilling or incapable of so doing". *State of New York* v. *Local 1115*, 412 F.Supp. 720, 724 (E.D. N.Y. 1976).

On remand the union appealed the granting of the preliminary injunction. On March 14, 1977 the Appellate Division, Second Department, in a 3-2 decision, rejected the union's preemption argument and affirmed the preliminary injunction.

Meanwhile the NLRB began to assert its authority over the dispute. On May 3, 1976, pursuant to charges filed by Local 1115 on December 30, 1975, the Regional Director issued a consolidated amended complaint against the nursing home employers. Following a hearing on June 22-23, 1976, an administrative law judge found the employers guilty of unfair labor practices and ordered them to cease and desist. This order, issued on November 18, 1976, was adopted by the NLRB on January 28, 1977.

In addition, the NLRB instituted the present action on September 8, 1976 to enjoin the State from restraining the strike activity of Local 1115.[3] Also sought is a declaratory judgment that labor relations in the nursing home field are within the exclusive

[3] The NLRB reports that, since the preliminary injunction was issued, the employers have made the required payments into the welfare and legal service funds, thereby removing the immediate threat of a strike. The initial failure to make the payments, however, has not been rectified.

Despite the absence of an imminent strike, this action is not moot. The State court preliminary injunction is still in effect. This paralyzes the employees' right to strike and infringes on the NLRB's exclusive jurisdiction.

jurisdiction of the NLRB and that State authority is preempted by the NLRA. The matter is now before the court on the Board's motion to preliminarily enjoin the State and its officials from prosecuting the State court action against Local 1115, enforcing the preliminary injunction issued in that action, or in any way attempting to regulate conduct which is within the Board's exclusive jurisdiction.

II.

The State first seeks to avoid the preemption issue by arguing that this action should not be entertained because it is a collateral attack on the court's remand order in *State of New York* v. *Local 1115*, *supra*. Review of an order of remand is prohibited on appeal or otherwise. 28 U.S.C. § 1447(d).

The State's contention, while tempting, cannot be sustained. The Board in this action does not seek to question the propriety of the remand order. In the prior action the Board was not a party[4] and the court had no opportunity to consider the question of the Board's exclusive jurisdiction over labor relations in the nursing home field. Consequently, the maintenance of this action in federal court does not circumvent the proscriptions of § 1447(d). See *Rath Packing Co.* v. *Becker*, 530 F.2d 1295, 1303 (9 Cir.

[4] A board representative did participate in the oral argument on the motion to remand, but his participation was minimal. This does not foreclose the Board from proceeding with the present action. See *United States* v. *California*, 381 U.S. 139, 175 n.49, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965).

1975), *aff'd*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed. 2d 604 (1977).

Turning now to the preemption issue, the court recognizes that the Supreme Court has established the following general rule:

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959).

This rule, reaffirmed in numerous cases, including the recent case of *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), does have certain exceptions. The exception most relevant to the present action was expressed in *Garmon* itself, where the Supreme Court announced that the preemption doctrine does not apply to activity which

> "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 243, 79 S.Ct. at 779.

In determining the applicability of this exception, the court must examine the State interests in regulating the activity at issue and the potential for interference with the federal regulatory scheme. *Farmer* v. *United Brotherhood of Carpenters and Joiners of America, Local 25, supra*, 430 U.S. at 297, 97 S.Ct. at 1062.

The State's primary concern is to protect and promote the health of its inhabitants. An interest more "deeply rooted in local feeling and responsibility" would be difficult to find. Since residents of nursing homes are among the weakest and most vulnerable members of society, the New York State legislature empowered the Commissioner of Health to supervise and regulate the operation and management of nursing homes. See, *e.g.*, N.Y. Public Health Law §§ 2801, 2808, 2895. When the strike announcement by Local 1115 appeared to pose an immediate threat to the health and lives of the affected nursing home residents, the State, seeing no alternative, obtained a preliminary injunction against the strike.

Unfortunately, the preliminary injunction directly interferes with the union's right to strike, which is protected by § 7 of the NLRA. In *Automobile Workers* v. *O'Brien*, 339 U.S. 454, 457, 70 S.Ct. 781, 94 L.Ed. 978 (1950), the Supreme Court considered the question of concurrent State regulation of peaceful strikes for higher wages and declared: "Congress occupied this field and closed it to state regulation."

Congress gave nursing home employees the right to strike in 1974, when it amended the National Labor Relations Act to extend coverage of the Act to some 1,400,000 employees of "health care institutions."[5] Congress clearly intended to grant these employees a federally guaranteed right to strike, with only minimal restrictions attached. They must give 10 days notice of their intent to strike. 29 U.S.C. § 158(g). If a dispute arises during bargaining for an initial agreement following certification or recognition, they must give thirty days notice of the existence of the dispute. 29 U.S.C. § 158(d)(B). The Director of the Federal Mediation and Conciliation Service may establish a Board of Inquiry to investigate a dispute and report to the parties its recommendations for settling the dispute. 29 U.S.C. § 183 (a). The status quo must be maintained until 15 days after the Board of Inquiry issues its report. 29 U.S.C. § 183(c).

There can be little doubt that the impact of the 1974 amendments on State *labor* jurisdiction was considered by Congress. See, *e.g.*, 119 Cong. Rec. S6991 (daily ed. May 2, 1974), in which Senator Mondale recognized that State regulation would have to give way to the federal law. In the House an amendment that would have insulated State laws

[5] Section 2(14) defines a "health care institution" as

> "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person." 29 U.S.C. § 152(14).

from preemption under the new amendments was defeated. 119 Cong. Rec. H4599 (daily ed. May 30, 1974).

The State argues that, should these employees be permitted to strike, the health and welfare of the nursing home residents would be seriously jeopardized. While this appears to be true, Professor Cox has correctly stated that

> "where § 7 guarantees employees the right to engage in concerted activities, the guarantee applies to nearly all peaceful primary strikes and picketing in support of normal collective bargaining objectives even when they occur in a dispute threatening to cut off essential public services." Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1340 (1972).

The only remaining issue, therefore, is whether injunctive relief is appropriate to bar further action by the State in this matter.

Despite the general prohibition against the use of federal injunctions to interfere with State court proceedings, 28 U.S.C. § 2283, the Supreme Court has held that the National Labor Relations Board has implied authority to enjoin State proceedings where federal power preempts the field. *N.L.R.B.* v. *Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 30 L.Ed. 2d 328 (1971); see also *Mitchum* v. *Foster*, 407 U.S. 225, 235-36, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972). Since State regulation of the right of nursing home employees to strike is preempted by the 1974 amendments to the NLRA, the court has no alternative but

to grant the NLRB's request for a preliminary injunction against all State proceedings, including the preliminary injunction issued in State court, insofar as they seek to regulate the employees' right to strike.

Given the vulnerable state of the residents of nursing homes should there be a cessation of services by those who are charged with their care, note must be taken that NLRA supremacy over the *economic* rights of unionized employees does not strip the State of its residual powers to protect the lives and health of those residents. While the State may not prohibit the employees from going out on strike or engaging in peaceful picketing, when it appears that the lives and health of nursing home residents are threatened, the State remains free, in the exercise of its local responsibility, to take whatever reasonable steps are necessary to protect the residents from the effects of strike activity.

At this juncture, however, the court need only decide that State regulation of the right of nursing home employees to strike is preempted by the NLRA as amended. Accordingly, the NLRB's motion for a preliminary injunction is granted. Settle form of order on notice.

SO ORDERED.

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